

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**March 28, 2003**

**IN RE:**

**PETITION OF XO TENNESSEE, INC. TO OPEN  
A CONTESTED CASE PROCEEDING TO  
MONITOR COMPLIANCE WITH TRA RULES  
AND ORDERS ON DIRECTORY COVERS**

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**DOCKET NO.  
02-01106**

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**INITIAL ORDER GRANTING MOTION TO WITHDRAW COMPLAINT  
FILED BY XO TENNESSEE, INC.**

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This matter is before the Pre-Hearing Officer on the *Motion to Withdraw Complaint* filed by XO Tennessee, Inc. ("XO"). The *Motion*, which is unopposed, asserts that all matters in this proceeding have been settled.

**Background**

On October 2, 2002, XO filed its *Petition of XO Tennessee, Inc. to Open a Contested Case Proceeding to Monitor Compliance with TRA Rules and Orders on Directory Covers*. XO requested the panel to open a contested case and appoint a Pre-Hearing Officer to assure compliance with *BellSouth Advertising & Publishing Corporation v. Tennessee Regulatory Authority*, 79 S.W.3d 506 (Tenn. 2002), *cert. denied*, \_\_U.S.\_\_, 71 USLW 3390, 2003 WL 397514 (February 24, 2003) (the "*BAPCO* opinion"), with regard to the Nashville white pages telephone directory. XO alleged that publication of the book was imminent. On October 10, 2002, BellSouth Advertising & Publishing Corporation ("*BAPCO*") filed a *Response to the Petition*, opposing the

convening of a contested case on the grounds that BAPCO was complying with all applicable orders and the Authority's involvement could create a disincentive to negotiate in good faith. On October 14, 2002, US LEC of Tennessee, Inc. ("US LEC") moved to intervene.

At a regularly scheduled Authority Conference on October 21, 2002, the panel unanimously voted to convene a contested case and appointed a mediator to oversee negotiations. US LEC's *Motion to Intervene*, which was unopposed, was granted by the Authority.

On October 28, 2002, the Authority issued a *Notice* scheduling a Hearing in this matter. On October 29, 2002, the parties filed a *Motion to Suspend Proceedings* ("*Motion to Suspend*") which asserted that they had reached a settlement of all issues concerning the terms and conditions under which the logos of the requesting competing local exchange carriers ("CLECs") would appear on the cover of the 2003 white pages directories for Nashville and Knoxville. The *Motion to Suspend* indicated that the terms and conditions of the settlement related only to the Nashville and Knoxville directories and were not intended to establish a precedent concerning other directories. The *Motion to Suspend* asked that no action be taken by the Authority in this docket unless otherwise requested by a party. A *Notice* canceling the Hearing was issued on October 29, 2002. The panel granted the *Motion to Suspend* at the November 4, 2002 Authority Conference.

On November 25, 2002, XO filed the *Motion to Restart Proceedings* ("*Motion to Restart*") asserting that the parties could not reach an agreement regarding the inclusion of its name and logo on the cover of BAPCO's 2003 white pages directory for Memphis. The *Motion to Restart* stated that the issues must be resolved by December 31, 2002, to

avoid delaying the publication and distribution of the directory. The *Motion to Restart* requested that a Pre-Hearing Conference be convened and an expedited procedural schedule be established. At the December 2, 2002 Authority Conference, the panel appointed General Counsel or his designee as Pre-Hearing Officer to prepare the docket for a Hearing.

A Pre-Hearing Conference was held on December 3, 2002, by agreement of the parties. In attendance at the December 3, 2002 Pre-Hearing Conference were:

BellSouth Advertising & Publishing Corporation – **Guilford F. Thornton, Jr., Esq.**, Stokes, Bartholomew, Evans & Petree, 424 Church Street, Suite 2800, Nashville, TN 37219;

US LEC of Tennessee, Inc. and XO Tennessee, Inc. – **Henry Walker, Esq.**, Boulton, Cummings, Conners & Berry, 414 Union St., No. 1600, Nashville, TN 37219.

During the Pre-Hearing Conference, the parties acknowledged that the sole issue of determining a just and reasonable rate remained to be resolved in this proceeding. The parties further acknowledged that the official publishing deadline for the Memphis directory was January 1, 2003, with a built-in lag-time of one (1) month. Thus, the actual deadline for resolving the issue was February 1, 2003.

During a discussion of the procedural schedule, the parties jointly requested that the Pre-Hearing Officer bifurcate these proceedings and schedule a Hearing solely on the methodology the panel would utilize to determine a just and reasonable rate. The parties indicated that they would be more likely to reach a settlement on the rate if the panel preliminarily determined whether BAPCO could charge a price that is based upon cost and public policy considerations or is market-driven, *i.e.*, derived from other directory advertising rates and determined primarily by the private negotiations of parties. BAPCO advocated the market-driven, advertising-based methodology, and the Petitioners

supported the cost and policy-based methodology. The parties memorialized their proposal for an expedited decision on the methodology to be used to determine a just and reasonable rate in the *Joint Motion for Interim Ruling* filed on December 4, 2002.

On December 5, 2002, the Pre-Hearing Officer issued the *Order Establishing Procedural Schedule and Denying Joint Motion for Interim Ruling*. The Pre-Hearing Officer reasoned that preliminarily resolving the issue of the methodology for establishing a rate was not in the best interest of the Authority because the focus of the *Petition* was to assure compliance with the Tennessee Supreme Court's decision in the *BAPCO* case and not just on a methodology for rates. The Pre-Hearing Officer established a Procedural Schedule and specified the evidentiary criteria that would be required in order to provide the basis for the determination of a just and reasonable rate.

On December 9, 2002, counsel for BAPCO and XO informed the Pre-Hearing Officer that they had reached a settlement and requested that the Procedural Schedule be suspended. As part of the settlement, BAPCO prepared mock ups of the covers of the directories for Chattanooga and Memphis. XO agreed that upon its approval of the mock ups, it would withdraw its *Petition*.<sup>1</sup>

On March 19, 2003, XO filed the *Motion to Withdraw Complaint* ("*Motion to Withdraw*"). As grounds for the *Motion to Withdraw*, XO asserted that all matters in this proceeding had been settled. The Pre-Hearing Officer was notified that US LEC did not object to the *Motion to Withdraw*.

The *Motion to Withdraw* is unopposed. The parties have represented to the Pre-Hearing Officer that they have reached a settlement of all matters raised in the *Petition of*

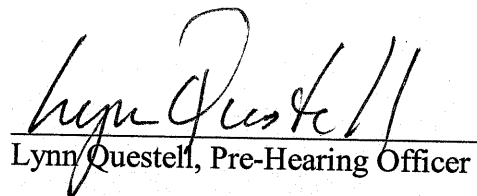
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<sup>1</sup> The mock ups XO approved for Chattanooga and Memphis were filed with the Authority on March 21, 2003.

*XO Tennessee, Inc. to Open a Contested Case Proceeding to Monitor Compliance with TRA Rules and Orders on Directory Covers.* Having considered the *Motion* and the entire record, the Pre-Hearing Officer hereby finds that the interests of justice and administrative economy will best be served by granting the *Motion*. Accordingly, the *Motion to Withdraw Complaint* is granted.

**IT IS THEREFORE ORDERED THAT:**

1. The *Motion to Withdraw Complaint* filed by XO Tennessee, Inc. is granted.
2. Docket No. 02-01106, *Petition of XO Tennessee, Inc. to Open a Contested Case Proceeding to Monitor Compliance with TRA Rules and Orders on Directory Covers*, shall be administratively closed upon this Order becoming final.<sup>2</sup>

  
Lynn Questell, Pre-Hearing Officer

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<sup>2</sup> This *Initial Order* is issued pursuant to Tenn. Code Ann. § 4-5-314 and shall become final within fifteen (15) days from the date of entry unless reviewed in accordance with Tenn. Code Ann. § 4-5-315.